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| **Appeal Decision** |
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| **by Susan Doran BA Hons MIPROW** |
| **an Inspector on direction of the Secretary of State for Environment, Food and Rural Affairs** |
| **Decision date: 30 June 2021** |

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| **Appeal Ref: FPS/G3300/14A/22** |
| * This Appeal is made under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981 against the decision of Somerset County Council not to make an Order under section 53(2) of that Act.
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| * The Applications dated 22 September 2008 and 12 December 2008 were refused by Somerset County Council on 6 February 2020.
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| * The Appellant, South Somerset Bridleways Association, claims that the appeal routes in the parish of Broadway should be added to the definitive map and statement for the area as three public bridleways and a byway open to all traffic.
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| **Summary of Decision: The appeal is allowed** |
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Preliminary Matters

1. I have been directed by the Secretary of State for Environment, Food and Rural Affairs to determine an appeal under Section 53(5) and Paragraph 4(1) of Schedule 14 of the Wildlife and Countryside Act 1981.
2. I have not visited the sites but I am satisfied I can make my decision without the need to do so.
3. The Appeal concerns four applications made on behalf of the South Somerset Bridleways Association (‘the Appellant’) which were considered by Somerset County Council (‘the Council’) in a single Committee report dated 6 January 2020. The routes are marked on a plan appended to that report at Appendix 1, which I have found it convenient to refer to in this decision. The first route, which I shall call ‘Appeal Route A’, commences at Dingford Green Farm, point A, and passes through points Ai to B ending at C, Long Drove. The second, ‘Appeal Route B’, commences at point C and passes through points Ci to D and ends at E and is known as Long Drove. The third, ‘Appeal Route C’, commences at point D on Long Drove and runs to point F, Hare Lane. These routes are claimed as bridleways. The fourth route, a claimed Byway Open to All Traffic[[1]](#footnote-1), ‘Appeal Route D’, commences on Hare Lane, point G, and runs to point H, Newhouse Farm. For convenience, and to avoid unnecessary repetition, I consider the evidence for all the routes together, as much of it is shared by them.
4. Comments and submissions have been made by and/or on behalf of the Appellant, the Council and interested landowners. I have taken into account these and all other evidence available to me.

Main issues

1. The applications were made under Section 53(2) of the 1981 Act which requires the surveying authority to keep their Definitive Map and Statement under continuous review, and to modify them upon the occurrence of specific events cited in Section 53(3).
2. Section 53(3)(c)(i) of the 1981 Act specifies that an Order should be made on the discovery of evidence which, when considered with all other relevant evidence available, shows that a right of way which is not shown in the map and statement subsists or is reasonably alleged to subsist over land in the area to which the map relates.

As made clear in the High Court in the case of *Norton and Bagshaw*[[2]](#footnote-2),this involves two tests:

 **Test A.** Does a right of way subsist on a balance of probabilities?

 **Test B.** Is it reasonable to allege on the balance of probabilities that a right of way subsists? For this possibility to exist, it will be necessary to show that a reasonable person, having considered all the relevant evidence available, could reasonably allege that a right of way subsists.

1. In relation to Test B, the Court of Appeal recognised in the *Emery*[[3]](#footnote-3) case that there may be instances where conflicting evidence was presented at the schedule 14 stage. Roche LJ held that *"…The problem arises where there is conflicting evidence…In approaching such cases, the authority and the Secretary of State must bear in mind that an order…made following a Schedule 14 procedure still leaves both the applicant and objectors with the ability to object to the order under Schedule 15 when conflicting evidence can be heard and those issues determined following a public inquiry."*
2. The evidence adduced is documentary and user. Section 32 of the 1980 Act requires a court or tribunal to take into consideration any map, plan or history of the locality, or other relevant document which is tendered in evidence, giving it such weight as is appropriate, before determining whether or not a way has been dedicated as a highway.
3. The user evidence can be considered against the requirements of Section 31(1) of the Highways Act 1980 (‘the 1980 Act’) which provides that *“Where a way over any land, other than a way of such a character that use of it by the public could not give rise at common law to any presumption of dedication, has been actually enjoyed by the public as of right and without interruption for a full period of 20 years, the way is to be deemed to have been dedicated as a highway unless there is sufficient evidence that there was no intention during that period to dedicate it”* and Section 31(2), that “*The period of 20 years referred to in subsection (1) above is to be calculated retrospectively from the date when the right of the public to use the way is brought into question, whether by a notice … or otherwise”*. The question of dedication may also be examined in the context of common law. At common law a right of way may be created through expressed or implied dedication and acceptance with no set period of user.

Reasons

***Documentary evidence***

*Neroche Forest Inclosure records*

1. There is no evidence of the existence of the appeal routes prior to 1833 when all four were set out as ‘private roads’ under the Neroche Forest Inclosure Award further to the Neroche Forest Inclosure Act 1830, which incorporated provisions of the 1801 Inclosure Consolidation Act.The private roads awarded, including the appeal routes, were to be maintained at the expense of the owners and occupiers of the adjoining allotments. In addition, the Inclosure Commissioners set out some 14 public carriage roads.
2. The Appellant cites the *Craggs[[4]](#footnote-4)* case in support of their appeal. In *Craggs* it was held that the Commissioners intended that the various routes described as ‘private roads and ways’ be open to use by the public[[5]](#footnote-5). In other words, that the Commissioners were intending to award public rights over those routes they described as private. Nevertheless, it was held that the Commissioners powers did not extend to establishing public vehicular rights over these ways. Lievan J concluded had the Commissioners only intended to create a small number of public rights of way across the area affected by that Award, it would have been contrary to the interests of the area at the time given the dependence on horses for transportation. Accordingly, given the size of the area affected by the Neroche Award, the Appellant argues that the provision of only 14 public roads would have been insufficient to enable the public to access their properties or land, so the ‘private roads’ must similarly have been available to the inhabitants of the parishes affected by enclosure.
3. By contrast, the Council cites the *Dunlop[[6]](#footnote-6)* case, also incorporating provisions of the 1801 Act, which they argue fits more closely with the facts of the present Inclosure Award. The use of private roads by the public was not a point raised in *Dunlop*, although like the Neroche Award no class of user of the private roads was specified. Indeed, there is no indication in either the Neroche Act or Award as to who was entitled to use the private roads and no indication that they enjoyed any public rights. This differs to the circumstances considered in the *Craggs* case. In *Dunlop* it was held that the term ‘private’ refers to the lawful class of user of a route, that is, private roads were for the use of a limited, if unspecified, section of society rather than the public as a whole.
4. There is therefore a conflict of interpretation of the effect of the Neroche Award in the light of existing (*Dunlop*) and recent (*Craggs*) case law, and whether the 14 public carriage roads set out in Neroche Award were sufficient to meet the needs of the travelling public, a point on which the parties reach different conclusions. Nevertheless, even if the Inclosure Award is conclusive evidence only of the existence of the appeal routes as private roads in 1833, this would not preclude public rights becoming established after that date.

*Broadway Tithe Map 1844*

1. All four appeal routes are depicted on the Tithe map coloured in the same manner as public roads and without an apportionment number. Tithe records were not produced to record public rights of way, but rather to identify productive land for which a tithe was payable. The depiction of the appeal routes on the Tithe Map nonetheless is good evidence of their physical existence, albeit not their status, although the possibility of public rights existing is not ruled out.

*Draft Plan of lands belonging to the Trustees of the late Earl of Egremont and Sales documents concerning the* *Earl of Egremont’s Estate and the Wyndham Estate*

1. A range of documents including plans, sales particulars and so forth dating between the 1850s and 1920 individually concern one or more of the appeal routes. Whilst prepared for private purposes and not with identifying public rights in mind, all are consistent in excluding the appeal routes from the various land parcels depicted and/or described, which favours the Appellant’s case. Plots were, however, sold subject to rights of way and easements, and liability for the repair of roads fell upon purchasers, which is consistent with the Inclosure Award.

*Ordnance Survey Maps, Object Names Books and Boundary Remarks Books*

1. All four appeal routes are depicted on Ordnance Survey (‘OS’) mapping with extracts provided dating between 1888 and 1940. In later maps they are shown as uncoloured routes which the keys indicate could be either minor public roads, or private roads. OS maps have long carried a disclaimer as regards the routes they show, so do not provide evidence of status but are useful evidence of the physical existence and alignment of the routes recorded at the time. Nevertheless, the inclusion of route on a series of OS maps, as here, can be useful evidence in helping to determine status when considered together with other evidence.
2. The OS Object Name Books 1901/2 and associated OS maps describe Appeal route B as a “public road” and an “unmetalled road”, the description of the latter also referencing that a description of the way in the Object Name Book is “incorrect”. By a comparison of the dates and red ink alterations to the descriptions, the latter reference appears to relate to an earlier Object Name Book that has not survived. Accordingly, reference to this appeal route as a ‘public road’ must carry some weight. However, this is tempered in that neither of the local representatives corroborating the entry was asked to in respect of that particular wording, but rather to confirm the description as ‘road’. Accordingly, there is no contemporaneous evidence from local sources to support the appeal route’s reputation as described.
3. The OS Boundary Remarks Book c.1885 includes the northern part of Appeal Route A from point B to C, but there is nothing to indicate the status of the section depicted.

*Finance Act records 1910*

1. All four appeal routes are shown uncoloured, un-numbered and excluded from adjacent land parcels on the Finance Act Map. The exclusion of a route in this way is suggestive that it was a public highway, usually though not always a vehicular way. The Appellant cites *Fortune, Gallagher and Agombar[[7]](#footnote-7)* and the weight afforded in these cases to uncoloured routes as an indicator of public rather than private status, vehicular in nature.
2. However, there may be other reasons for a route to be excluded, for example, where a private road has been set out in an inclosure award for the use of a number of people and where its ownership has not been assigned to any individual. Indeed, it is argued that it is consistent with a ‘common way’, a route owned by several people, used in common, with a shared maintenance liability. In this case the route was awarded as private in 1833, but with no indication given as to who was entitled to use it. Ownership was not ascribed but responsibility for its maintenance lay with the allotment holders.
3. Accordingly, there is a conflict of credible evidence, and the Finance Act records need to be considered alongside all the other available evidence. In this regard, the Appellant refers to the OS Object Names Books being near contemporary evidence which they argue is supportive of public rights and of their case.

*Bartholomew’s Map 1911, 1927*

1. All four appeal routes appear as uncoloured roads which are identified as ‘inferior’ and not recommended for use by cyclists. This is suggestive at least of their reputation. However, it is not clear that enquiries were carried out on the ground as to the status of routes shown on the maps. Based on OS mapping, Bartholomew’s maps carry a disclaimer as regards the status of the routes they portray. They are, however, close in date to the Finance Act Map, so lend limited support to the case in favour of public rights.

*Ministry of Food National Farm Survey 1941-2*

1. All four appeal routes are shown uncoloured and excluded from coloured land holdings in the same manner as other routes currently recorded as public vehicular ways. Whilst the purpose of the Survey concerned the war effort, the exclusion of the appeal routes on the map at least provides limited support for the Appellant’s case.

*1946 aerial photograph*

1. The photograph provides good evidence of the physical existence and character of the appeal routes at the time it was taken but is of no assistance in terms of status.

*Council records*

1. The appeal routes are not recorded within the highways records, for example the 1929 Handover Map, as roads maintainable at public expense, although this is not evidence that they were not public. There are submissions that none of the appeal routes, as private roads, were legally adopted, but this would not be a requirement for them to be considered to carry public rights of some sort.
2. Rural District and Parish Council Minutes for 1936 refer to the possibility of ‘taking over’ the roadway between Hare Lane and Newhouse Farm (Appeal Route D) for the benefit of the public. It is not clear that this was because it was considered to be public, or there was a desire for it to be so for reasons of convenience. In the late 1960s Parish Council Minutes discussed opening up bridleways, including the appeal routes (or some of them) and evidence was forwarded to the Rural District Council and County Council. However, on the limited evidence provided they were not considered to be public rights of way by the County Council. In the early 1970s correspondence with the County Council indicated the Parish Council regarded Appeal Route A, points A to B, as a footpath/bridleway.
3. None had been claimed during the process that culminated in the production of the Definitive Map and Statement, and no challenge made to their omission from the records. Of note, however, is that a route recorded as a public footpath[[8]](#footnote-8) terminates on the continuation of Appeal Route A, north of point C, suggesting that it was considered to be a public right of way of a higher status, presumably vehicular, since it was not claimed during the preparation of the records at the time.

***User and landowner evidence***

1. Use of the appeal routes is claimed by 18 individuals on foot, horseback, bicycle or with a vehicle for varying periods from the early 1970s and with varying frequency, and was considered by the Council under the tests set out in section 31 of the 1980 Act. Claimed use varies between the appeal routes. However, given the relatively low numbers of people using them in any relevant 20-year period, it was concluded that the user evidence on its own was insufficient to reach a finding that a presumption of dedication had arisen over any of the appeal routes.
2. One reason for the Council reaching these findings concerns the designation of the appeal routes as common land which by virtue of the Countryside and Rights of Way Act 2000 is open access land with a right to open air recreation on foot, subject to restrictions and exceptions specified in the Act. Accordingly, the Council concluded use of the appeal routes here could not be ‘as of right’, although it is thought that some sections may be subject to exemptions which would mean their use would not be ‘by right’. However, public rights of way can and do exist over common land, and can be established by deemed dedication through user, depending on the circumstances. In any event, if historic public rights are determined to exist over the appeal routes then the use described by the claimants would be supportive of the continued use of those existing rights and is consistent with the status claimed for the individual appeal routes.
3. Although no evidence is adduced of ownership of the appeal routes themselves, it is argued that adjacent landowners own to the centre of the tracks. As regards landowners, it is said there has been no use of Appeal Route A between points A and B. Indeed, there are indications that this route was obstructed around, or since, the 1980s. Use by mechanically and non-mechanically propelled vehicles of the section B to C is claimed since Brook Farm (formerly Swaddles Green Farm, a 16th century building) came into being. However, this seems to be in relation to private access rights by those living and working at the property, a matter outside the remit of this appeal decision. There is evidence that a (late) landowner had personally challenged ‘unauthorised use’ of Appeal Route B, although another landowner had observed use by horse riders, but this is not further qualified. The veracity of the user evidence as regards Appeal Route D is questioned.

***Conclusions on the evidence***

1. The appeal routes were set out as private ways under the 1833 Inclosure Act, though it is argued that, in this case, they would have been available for use by the public given that few public ways were awarded. Much of the subsequent evidence whilst not indicating public rights does not preclude the existence of such rights. In support of the Appellant’s case are, arguably, the Finance Act Map, Bartholomew’s Maps, National Farm Survey and OS Object Name Book (Appeal Route B), the views of the Parish Council (Appeal Route A), the Definitive Map and Statement as regards the footpath north of Appeal Route A, and user evidence. However, it is arguable that much of the evidence supports the interpretation that the appeal routes set out as private roads in 1833 remained so. I find there is a conflict of credible evidence and no incontrovertible evidence that public rights do not exist.
2. Whilst the supporting evidence is limited, in my view it is sufficient to support a reasonable allegation that public rights subsist as bridleways over Appeal Routes A, B and C, and with public vehicular rights over Appeal Route D, which due to the effect of the Natural Environment and Rural Communities Act 2006, and in the absence of any indication that an exemption applies, as a Restricted Byway.

Conclusion

1. Having regard to these and all other matters raised in the written representations I conclude that the appeal should be allowed.

Formal Decision

1. In accordance with paragraph 4(2) of Schedule 14 to the 1981 Act Somerset County Council is directed to make an order, or orders, under section 53(2) and Schedule 15 of the Act to modify the definitive map and statement for Somerset County Council to add three public bridleways from Dingford Green Farm to Long Drove, the route known as Long Drove, and from Long Drove to Hare Lane and a restricted byway from Hare Lane to Newhouse Farm as proposed in the applications dated 22 September 2008 and 12 December 2008. This decision is made without prejudice to any decisions that may be given by the Secretary of State in accordance with their powers under Schedule 15 of the 1981 Act.

S Doran

**Inspecto****r**

1. Section 67(1) of the Natural Environment and Rural Communities Act 2006 extinguished public rights for mechanically propelled vehicles subject to certain exceptions. If public vehicular rights are considered to exist (and none of the exemptions applies) and the appeal succeeds in this respect, then an order should be made for a Restricted Byway over this appeal route [↑](#footnote-ref-1)
2. R v Secretary of State for the Environment ex parte Mrs J Norton and Mr R Bagshaw [1994] [↑](#footnote-ref-2)
3. R v Secretary of State for Wales ex parte Emery [1998] [↑](#footnote-ref-3)
4. Venetia Craggs v Secretary of State for the Environment, Food and Rural Affairs [2020] EWHC 3346 (Admin) [↑](#footnote-ref-4)
5. The wording of the Award in the Craggs case specified use by “*all and every other person and persons whomsoever having any occasion whatsoever to go travel pass and repass through upon and over the same roads and ways…*” [↑](#footnote-ref-5)
6. Dunlop v Secretary of State for the Environment and another [1995] [↑](#footnote-ref-6)
7. Fortune v Wiltshire Council [2012] EWCA Civ 334; Commission for New Towns v Gallagher [2003] 2 P & CR 3; Robinson & Webster Holdings Ltd v Agombar [2001] HC [↑](#footnote-ref-7)
8. Footpath CH/30 [↑](#footnote-ref-8)